

## Louisiana Law Review

---

Volume 22 | Number 1

*Symposium: Assumption of Risk*

*Symposium: Insurance Law*

*December 1961*

---

# Taken for a Ride: The Automobile Guest and Assumption of Risk

Willard H. Pedrick

---

### Repository Citation

Willard H. Pedrick, *Taken for a Ride: The Automobile Guest and Assumption of Risk*, 22 La. L. Rev. (1961)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol22/iss1/8>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# Taken for a Ride:

## The Automobile Guest and Assumption of Risk

*Willard H. Pedrick\**

If he survives the hospitality of hearth and home the social guest can always be taken for an automobile ride. Should negligence in the maintenance of the home or in driving perchance bring injury or death to his friend the law of torts simply licenses the host to do the same for another friend. Though social relations surely stand high on the list of interests cherished by our society, one who ventures forth in response to an invitation to visit the home or to ride in the car commonly steps outside the protection of the conventional duty of care. Why the law should deal so meanly with the interest in social relations as regards protection from physical injury is an interesting and curious chapter in the history of an interesting and curious institution. With respect to the premises perhaps a distinction could be rationalized between the condition of land, to be taken by the guest as he found it, as compared with activity on the part of the host generating new hazards after his guest's arrival.<sup>1</sup> Even as respects real property such a distinction becomes shadowy and has little to commend it. As regards vehicles and their use, it strikes a strange note.<sup>2</sup>

Perhaps, as has been said, the doctrines of the common law and the legislation in this area do express a philosophy of rugged

---

\*Professor of Law, Northwestern University School of Law.

1. The duty of care with respect to activity on the premises runs even to those who are on the premises without invitation by the landowner — trespassers. RESTATEMENT, TORTS § 337 (1934); PROSSER, TORTS 435-437 (2d ed. 1955); HARPER AND JAMES, TORTS § 27.10 (1956).

A good short statement of this principle will be found in the opinion by Denning, L. J., now Lord Denning, in *Slater v. Clay Cross Co. Ltd.*, (1956) 2 A.E.R. 625.

2. See *O'Shea v. Lavoy*, 175 Wis. 456, 185 N.W. 525 (1921), analogizing the liability of the driver towards his guest to that of the landowner and exempting the driver on the ground that though he knew of the defect in the machine it was not in the nature of a trap. Cf. *Higgins v. Mason*, 255 N.Y. 104, 174 N.E. 77 (1930) (broken spindle pin — guest takes the car as he finds it).

There are, it must be admitted, some modern cases sounding this same old discordant note. See *Lippman v. Ostrum*, 22 N.J. 14, 123 A.2d 230 (1956) (no affirmative duty owed to a licensee who solicits a ride).

individualism but at the least the context of social relationships is an odd area for the expression of individualism. Whatever the rationalization, and satisfaction in this area is not likely to be achieved, it is clear that the host has been accorded an impressive array of defensive weapons to afford protection from liability for negligently inflicted hurts to his guests. The plight of the automobile guest is illustrative.

When the guest sued his driver for personal injuries resulting from careless driving, in the early days, the defense of contributory negligence was occasionally successful.<sup>3</sup> Particularly in those few jurisdictions where the burden of proof on the contributory negligence issue is on the plaintiff the defense succeeded on more than a few occasions.<sup>4</sup> With the increase in highway speeds and mounting skepticism concerning the efficacy of "back-seat driving," however, contributory negligence in many jurisdictions has ceased to be a really productive defense in the commonplace guest-driver personal injury action.<sup>5</sup> At best the issue is put to the jury for resolution and save in extreme cases juries do not seem disposed to require passengers to do the driving. But the defendant has other strings to his bow.

At an early stage in automobile litigation and at a time when automobile insurance companies were concerned with limiting their function as far as possible a strange alliance between insurers and farm groups secured passage in a large number of states of the "automobile guest statutes."<sup>6</sup> These statutes result-

---

3. The cases are collected in the A.L.R. notes: 18 A.L.R. 309, 22 A.L.R. 1294; 41 A.L.R. 767; 63 A.L.R. 1432; 47 A.L.R. 293; 90 A.L.R. 984. These rather ancient annotations dramatize the flow and ebb of the contributory negligence defense in the guest cases.

4. In a few states, Illinois and Iowa among them, the burden of proving freedom from contributory negligence is on the plaintiff. See Green, *Illinois Negligence Law II*, 39 ILL. L. REV. 116, 125-130; James, *Contributory Negligence*, 62 YALE L.J. 691, 729-731 (1953). In such states in the case of a railroad crossing crash it may be difficult to establish that the guest was in fact maintaining a lookout, etc. just prior to the crash. By way of example see *Wheat v. Baltimore and Ohio R.R.*, 262 F.2d 289 (7th Cir. 1959) (applies Illinois law and judgment for defendant as matter of law—affirmed).

5. See the ALR notes cited in note 3 above and the more modern decisions in the Note, 42 A.L.R. 2d 350. See Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946); Note, *Duty of Auto Passenger to Exercise Care*, 37 N.D.L. REV. 282 (1961). The decision of the Michigan Supreme Court in *Yarabek v. Brown*, 357 Mich. 120, 97 N.W. 2d 797 (1959), noted 10 DRAKE L. REV. 141 (1960), contains some pointed observations on the desirability of de-activating the passenger as a co-pilot or "back-seat driver" and points to the change in power and speed of the automobile as the reason for the reduced responsibility of the passenger. See also WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* 596(6) (1951).

6. Tipton, *The Florida Automobile Guest Law Today*, 27 INS. COUNS. L.J.

ing from hitchhiker suits against uninsured or underinsured drivers and intra-family suits against insured defendants were aimed at relieving the driver (and his insurer) from liability save for the most horrendous performances at the wheel. Commonly phrased in terms of a requirement that the guest establish that the driver was "wilful," "wanton," "grossly negligent," or even "wilfully negligent" as a prerequisite to recovery by the guest,<sup>7</sup> these statutes do in fact represent a formidable obstacle to recovery by the guest.

It is a tribute to the lobby system of legislation that in this country a surgeon operating on a charity patient is bound to exercise ordinary care<sup>8</sup> but is permitted, should he drive his patient home from the hospital, to abandon that standard and be subjected to liability only on proof of gross negligence or wilful and wanton misconduct.

#### THE ROLE OF VOLENTI IN THE GUEST CASES

Notwithstanding the guest statutes, however, there are occasions when the plaintiff may be able to point to excessive speed, to deliberate chance taking, or to drunken driving as establishing such gross negligence or wanton misconduct as to satisfy the requirements of the statute. In such cases both in states with guest statutes and those without, the defense of ordinary contributory negligence is likely to be unavailing. Wanton misconduct or even gross negligence sounds like conduct of a different type or kind from ordinary negligence. Hence as it is commonly stated, ordinary contributory negligence is

223 (1960) (digesting 30 state laws and offering a short commentary). See Notes, 1 Wyo. L.J. 182 (1947) and 3 Wyo. L.J. 225 (1949), also collecting and classifying the statutes.

Tipton, *The Florida Automobile Guest Statute*, 11 U. FLA. L. REV. 287 (1958), reviews the history of guest statute adoption over the country. The Tipton article reports that 27 states have guest statutes and that all were adopted in the period 1927-1939. For other accounts see Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24 (1937); Comments, 35 MARQ. L. REV. 390 (1952); 55 MICH. L. REV. 1197 (1957).

7. Typical of the statutes are those of Illinois requiring "wilful and wanton misconduct," ILL. REV. STATS. ch. 95½, § 9-201 (1959); Texas requiring an "intentional [accident] . . . or heedlessness or reckless disregard of the rights of others" TEXAS CIVIL STATS. art. 6701b (Vernon 1960); and Michigan requiring "gross negligence or wilful and wanton misconduct" MICH. STATS. ANN. art. 9.2101 (1948). In *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615 (1936) a guest statute relieving the driver from liability save for intentional infliction of injuries was sustained as constitutional. For the struggles of a court to make sense of the term "wilful negligence" see *Sorrel v. White*, 103 Vt. 277, 153 Atl. 359 (1931).

8. See Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DE PAUL L. REV. 30 (1951); McNeice and Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949); 2 HARPER AND JAMES, TORTS 1045 (1956).

no bar to an action based on wilful or wanton misconduct.<sup>9</sup> Accordingly in such cases the defense is likely to rely on an ancient and generally disreputable doctrine of the common law known as the "assumption of risk,"<sup>10</sup> often referred to with its Latin maxim title *volenti non fit injuria*. The doctrine, as invoked in such cases, argues that the guest cannot recover despite outrageous misconduct by the driver for the reason that the guest had, with knowledge of the risk, expressly or impliedly agreed to "take his chances" and not to claim against the driver for any resulting injuries. Requisites for application of the doctrine are said to be a risk or condition of hazard, awareness of the risk by the passenger and consent to that risk.<sup>11</sup>

Examination of the automobile guest cases of the past decade as reflected in appellate court decisions<sup>12</sup> confirms that the assumption of risk defense is very much a factor in one common type of guest-driver personal injury action. There are a scattering of cases in which the weather or condition of the highway was especially adverse and where with respect to the resulting

---

9. 2 HARPER AND JAMES, TORTS § 22.6 (1956); PROSSER, TORTS 289-290 (2d ed. 1955); Note, 44 A.L.R.2d 1342. It must be recognized that in a few states ordinary contributory negligence is recognized as a defense to an action under a guest statute.

Further, in most states contributory gross negligence can be a defense to a claim based on gross negligence. RESTATEMENT, TORTS § 503 (1934).

10. In a considered condemnation of the assumption of risk doctrine, 2 HARPER AND JAMES, TORTS § 21.8 (1956) conclude that: "Except for express assumption of risk, therefore, the term and the concept should be abolished. It adds nothing to modern law except confusion."

Commenting on the doctrine in the English law, Professor STREET, TORTS 173 (1955) notes that: "It is a significant thing that this defense is rarely pleaded in modern cases . . . it is difficult to resist the conclusion that assumption of risk (except in the rare case where there is express consent) is no longer an important defense in the tort of negligence. Counsel seem to have little confidence in it, and the courts (especially because of the power to apportion) will, whenever possible, treat contributory negligence as the only available defense. . . . No such post 1945 English case based on negligence has been traced where the plaintiff failed solely because of this defense; indeed it might be difficult to find one in this century."

11. Characteristic is statement from *Schinke v. Hartford Accident and Indemnity Co.*, 10 Wis.2d 251, 103 N.W. 2d 73, 74 (1960): "In order that a guest can be held to have assumed the risk of the host's negligence the evidence must establish these three factors: (1) a hazard or danger inconsistent with the safety of the guest; (2) knowledge and appreciation of the hazard by the guest; and (3) acquiescence or a willingness to proceed in the face of danger."

12. This study proceeded on a quite unscientific basis and consisted of an examination of the volumes for the past 10 years of Automobile Cases published by CCH. The publisher states this special reporter includes the texts "of all automobile negligence decisions of the state high courts and of the federal appellate courts, together with comprehensive digests of leading automobile negligence cases from state intermediate and federal district courts." If the special series does not cover all it surely covers most of the automobile cases. From scanning the guest cases contained in these reports the writer has arrived at the prejudices reflected in the text.

crash the driver has argued, occasionally with success, that the guest had assumed the risk.<sup>13</sup> There are a few cases as well where the defense has been invoked with respect to the unskilled or handicapped driver.<sup>14</sup> Even more rare in modern cases is the defense when the crash is attributable to some defect in the condition of the machine.<sup>15</sup>

The single area where the assumption of risk defense is used effectively and in an apparent volume of cases is the drinking party auto crash case.<sup>16</sup> In the drinking party setting the guest has participated as a drinking companion, perhaps as a pace setter or at the minimum has knowledge that the driver is undertaking to mix alcohol and gasoline. One group of cases involves a group of young (or young in heart) men who wind up in what too often is a very serious auto wreck. Another group of cases involves the young woman whose "boy friend" persists in drinking and in driving. Many of the cases produce quite colorful records.

Notable is a 1958 Wisconsin decision, *Ven Rooy v. Farmers Mutual Insurance Co.*,<sup>17</sup> where there is recounted the story of a

---

13. Many of the cases concerned with situations where vision has been obscured by fog, snow, rain or sleet are collected in a Note, 42 A.L.R. 2d 350. See also *Le Mere v. Le Mere*, 6 Wis.2d 58, 94 N.W.2d 166 (1959) (condition of road might support an assumption of risk defense); *Kelly v. Checker White Cab Co.*, 131 W. Va. 816, 50 S.E.2d 888 (1948) (snow and ice on road — guest assumed the risk despite much cautioning of driver). *But cf.* *Geller v. Geller*, 314 Ky. 291, 234 S.W.2d 974 (1950) (wet, slick road — not ruled an unusual hazard and not a case for assumption of risk doctrine).

14. The cases are collected in a Note, 43 A.L.R.2d 1163. The Wisconsin cases have gone rather far in holding that the guest takes the driver as he is with respect to driving skill. For example, see *Eisenhut v. Eisenhut*, 212 Wis. 467, 248 N.W. 440 (1933). *Cf.* *Esernia v. Overland Moving Co.*, 115 Utah 519, 206 P.2d 621 (1949) (hitchhiker knew driver was sleepy yet failed to stay awake to keep driver from falling asleep — plaintiff defeated by contributory negligence).

15. The cases are collected in Note, 138 A.L.R. 838 (1942). See also *Mitchell v. Heaton*, 231 Iowa 269, 1 N.W.2d 284 (1941) (defective wheel bolts held assumption of risk by passenger who knew of condition); *Higgins v. Mason*, 255 N.Y. 104, 174 N.E. 77 (1930) (defective spindle — guest takes the car as he finds it); *Lippman v. Ostrum*, 22 N.J. 14, 123 A.2d 230 (1956) (guest takes car as it is complete with bad tire). *Cf.* *Woodward v. Tillman*, 82 So.2d 121 (La. App. 1st Cir. 1955) (guest present when brakes locked first time did not assume risk as to locking of brakes several hours later).

16. In *Baird v. Cornelius*, 12 Wis.2d 284, 107 N.W.2d 278 (1961), the majority refers to the "drinking party cases" citing three Wisconsin cases as illustrative. For other illustrations see *Waltanen v. Wiitala*, 361 Mich. 504, 105 N.W.2d 400 (1960); *McAllister v. Travelers Insurance Co.*, 121 So.2d 283 (La. App. 1st Cir. 1960) (handled as a contributory negligence case). Many of the cases are collected in the Note, 15 A.L.R.2d 1165. An unscientific impression from reading a decade of guest assumption of risk cases is that half or more of all these cases involved drinking drivers and a high percentage of the plaintiffs had joined in the fun.

17. 5 Wis.2d 374, 92 N.W.2d 771 (1958).

youthful group of four teenagers and one young man of twenty-one out on a round of tavern and dancehall visitations. After all hands had a number of beers and were merrily speeding down the highway at about 65 miles per hour with the teenagers singing "Sparrow in the Treetop" while the twenty-one year old driver registered his independence with "Bury me not on the Lone Prairie" the inevitable happened. In the resulting suit by a teenage brother of the driver brought, under Wisconsin practice, directly against the insurer, a jury finding that the passengers had assumed the risk was the basis for affirming the trial court judgment in favor of the defendant.

There has been an impressive degree of agreement among the various states on the proper disposition of such cases. A few states are not sympathetic to the doctrine, preferring to assimilate the entire subject of delinquent plaintiffs to the defense of contributory negligence.<sup>18</sup> An early trial court decision in the United Kingdom expressed hostility towards the assumption of risk defense in the drinking party setting,<sup>19</sup> but higher court decisions in Commonwealth courts<sup>20</sup> and intimations from later British cases<sup>21</sup> all indicate that the defense is available in such cases. In most of the states in this country that have considered the matter the defense of assumption of risk in such cases is recognized and applied in the drinking party cases.<sup>22</sup>

---

18. *Perry v. Schmidt*, 184 Kan. 758, 339 P.2d 36 (1959) (not disposed to introduce the assumption of risk doctrine into the automobile guest cases); *Hubenette v. Ostby*, 213 Minn. 349, 350, 6 N.W.2d 637, 638 (1942); *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943). See *Miller v. Decker*, (1957) S.C.R. 624, 9 D.L.R.2d 1, 9, for a strong statement in dissent to the effect that *volenti* is not usually the appropriate defense in the drinking party cases. Cf. *Schiller v. Rice*, 151 Tex. 116, 246 S.W.2d 607 (1952) (assumption of risk is not available in guest cases but the *volenti* doctrine can be used defensively in such cases!).

19. *Dann v. Hamilton*, (1939) 1 K.B. 509.

20. *Insurance Commissioner v. Joyce*, 77 Comm. L. Repts. 39 (1948); *Roggenkamp v. Bennett*, 80 Comm. L. Repts. 292 (1950); *Millar v. Decker* (1957) S.C. Gent-Diver v. Neville, (1953) Q.S.R. 1.

21. Although Denning, L.J., in *Slater v. Clay Cross Ltd.*, (1956) 2 A.E.R. 625 approves of *Dann v. Hamilton*, which some had thought held the defense of *volenti* unavailable in the drinking driver cases, his approval was grounded on the fact that he regarded it as a case properly handled under the contributory negligence defense. In *Davies v. Jones* (1958), a plaintiff guest's recovery was reduced in the court of appeals by agreement on the assumption that the rule in *Dann v. Hamilton* was not too secure a base on which to support the plaintiff's recovery. See 28 HALSBURY, LAWS OF ENGLAND, Negligence, p. 84, n.d. (3d ed. 1959).

22. See *Rice, The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 323, 349-350, 447 (1943); PROSSER, TORTS 304 (2d ed. 1955). Note, 15 A.L.R. 2d 1165. For typical drinking-driver-risk-assuming guest cases see *Young v. Wheby*, 126 W. Va. 741, 30 S.E.2d 6 (1944); *Waltanen v. Wiitala*, 361 Mich. 504, 105 N.W.2d 400 (1960); *Severson v. Hauck*, 11 Wis.2d 192, 105 N.W.2d 369 (1960).

There are, of course, evidentiary problems and one finds a considerable difference from state to state on the critical question whether the issue is to be put to the jury or whether the court may rule as a matter of law that the plaintiffs did know and did accept the risk in riding with the defendant.<sup>23</sup> There are in addition certain technical escapes from the doctrine applied on occasion. If it can be said that the cause of the accident was not the general risk in riding with an intoxicated driver but some later failure on his part even to exercise that care that might be expected under the circumstances then a recovery for the plaintiffs may be rationalized even though they assumed some risk — not this one.<sup>24</sup> There is as well an interesting disagreement among the courts on the significance of the fact that the plaintiff may have been so insensible at the time of decision as not to have been able to contract. Here some courts allow the plaintiff to escape the assumption of risk defense while others take the position that a self-induced deficiency cannot excuse him.<sup>25</sup> Nevertheless, with very few discordant notes the defense generally is recognized and applied to defeat personal injury actions brought by those who with knowledge of the fact accept an invitation to ride with a drinking or drunken driver.

#### ASSUMPTION OF RISK AND COMPARATIVE NEGLIGENCE

Is it a good thing to bar from suit injured passengers who ride with the driver knowing, perhaps from participation, that he is "under the influence"? Before offering a judgment on that question, largely neglected in the cases, it may be appropriate

---

23. *Cox v. Johnston*, 139 Colo. 376, 339 P.2d 989 (1959) (assumption of risk defense is for the jury); *Turner v. Johnson*, 333 S.W.2d 749 (Ky. 1960) (similar); *Quisenberry v. Herman*, 243 F.2d 250 (D.C. Cir. 1957) (assumption of risk instruction to jury proper on facts); *Verdino v. Hayes*, 201 N.Y.S.2d 853 (1960) (both parties drunk but not assumption of risk as a matter of law); *Cousins v. Cooper*, 339 S.W.2d 316 (Ark. 1960) (assumption of risk is generally for the jury). *But cf.* *Waltanen v. Wiitala*, 361 Mich. 504, 105 N.W.2d 400 (1960) (assumption of risk as a matter of law). *Boureston v. Boureston*, 231 Wis. 666, 285 N.W. 426 (1939) (similar). The cases are collected in Note, 15 A.L.R.2d 1165.

24. By way of illustration see *Hatcher v. Daniel*, 227 Miss. 862, 87 So.2d 90 (1956) (fishing camp road but guest did not assume risk that driver would not keep adequate lookout); *Le Mere v. Le Mere*, 6 Wis.2d 58, 94 N.W.2d 166 (1959) (similar); *Gent-Diver v. Neville*, (1953) Q.S.R. 1 (bad light risk accepted but not risk of driving on wrong side of road).

25. *McAllister v. Travelers Insurance Co.*, 121 So.2d 283 (La. App. 1st Cir. 1960) (to allow a guest to plead intoxication to escape the assumption of risk and contributory negligence doctrines would "be tantamount to placing a premium on moral turpitude." *Of.* dissenting opinion in *Millar v. Decker*, (1957) S.C.R. 624, 9 D.L.R.2d 1 arguing that after the drinking party had progressed a bit the plaintiff was in no condition to contract away a claim.



to consider certain changes in negligence law and its setting that considerably affect the modern automobile accident case. First there is the matter of the abandonment of contributory negligence as a complete defense in the United Kingdom, the states of Australia, the provinces of Canada, and a number of the states of this country.<sup>26</sup>

By the terms of the British Contributory Negligence Act of 1945<sup>27</sup> the "fault of the person suffering the damage" shall not defeat his action but shall be a ground for reducing his recoverable damages. The American statutes are aimed at the same objective though sometimes phrased more directly in terms of contributory negligence. The general idea accurately implemented by the language of the British act is to permit plaintiff to escape the assumption of risk defense while others tiffs to recover from negligent defendants despite contributory fault on their part. The precise basis or standard on which damages recoverable are to be reduced on account of the plaintiff's fault verges on the mysterious.<sup>28</sup> There is some talk in British

---

26. The statutes are reviewed in Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953), Maloney, *From Contributory Negligence to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958). See also WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE ch. 10 (1951). The Mississippi act has been described as a model of "brevity and simplicity." The Wisconsin statute only permits the plaintiff to recover if the plaintiff's negligence was less than that of the defendant. The Nebraska statute allows a plaintiff to recover whose negligence is slight in relation to the gross negligence of the defendant. 2 HARPER AND JAMES, TORTS 1238 (1956). For descriptions of other statutes in Georgia, Arkansas, Tennessee and South Dakota see Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960).

27. The Law Reform (Contributory Negligence) Act, 1945, 8 and 9 Geo. VI, c. 28. By Section 4 of the act the term "fault" on the part of the plaintiff is defined to mean "contributory negligence."

28. In the British Act it is provided that the reduction in the plaintiff's recoverable damages shall be "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." Expounding on the meaning of this language, Denning, L.J., now Lord Denning, in *Davies v. Swan Motor Co.*, (1949) 2 K.B. 291, at 326, said that "The amount of the reduction . . . involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness."

This kind of language gives little guidance and after discussing the matter at some length, Professor Glanville WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 484 (1951) concludes that it is not possible for an appellate court to lay down any "general principles to govern the exercise of the discretion other than the principle that the discretion must be exercised 'judicially'."

It must be conceded that the statutes are not drafted in a very definitive fashion. The British statute speaks about the plaintiff's share of "responsibility for the damage" which does sound like a command to weigh each of two or more causes and arrive at some quantitative conclusion. The Wisconsin statute speaks of diminishing the plaintiff's recovery "in proportion to the amount of negligence attributable to the person recovering." The Mississippi statute approved by Harper and James talks in terms of diminishing the plaintiff's recovery in proportion to the "amount of negligence" attributable to the plaintiff.

To determine the percentage contribution of one cause as against another in

cases about the "causative potency" of the plaintiff's negligence as compared with that of the defendant.<sup>29</sup> As if anyone could think sensibly with these words racing round his head! The most sensible suggestion for a guide line in reducing the plaintiff's recovery on account of his contributory fault takes into account the judicially ignored fact of life in accident litigation — the presence of liability insurance. The suggestion is that the apportionment of damages on account of the plaintiff's contributory negligence ought to be regarded as in the nature of a fine imposed on the plaintiff and assessed accordingly.<sup>30</sup> This approach rests on the assumption that normally damages not recoverable by the plaintiff will in fact be borne by him personally. Whatever the criterion for apportioning damages, however, the legislature in those jurisdictions where comparative negligence has been adopted has made plain its desire that plaintiffs not be barred from recovery because of their contributory fault.

In the face of this legislative prescription it would be a shocking thing if one class of cases were singled out by the courts as ineligible for this damage apportionment treatment. That, however, appears to be precisely what has happened! It is said that the defense of assumption of risk is distinct and apart from the defense of contributory negligence and accordingly that assumption of risk remains an absolute defense.<sup>31</sup> So it is that Wisconsin with its comparative negligence statute up to 1961 produced perhaps more than half of the appellate court decisions in this

---

a negligence case seems very much a will of the wisp chase. Similarly, to weigh the amount of negligence of one party relative to the negligence of another calls for scales not easily found. It should be recognized that the legislatures were unable to put into meaningful words any description of the formula to be used in the apportionment of damages under a comparative negligence statute. Surely guide lines are desirable if this is a legal system at work. If guide lines there are to be, they must be supplied by the courts who ought to accept the comparative negligence statute not as an end of judicial innovation but as a new beginning assisted by a legislative repudiation of the absolute rule of contributory negligence. From this point of view the very indefiniteness of the legislation may be a virtue.

29. See the quotation from Denning, L.J., in the preceding note.

30. See Parsons, *Negligence, Contributory Negligence and the Man Who Does not Ride the Bus to Clapham*, 1 U. OF MELB. L. REV. 163, 182-192 (1957), developing this suggestion in persuasive fashion.

31. WINFIELD, *TORTS* 47 (6th ed. 1954); FLEMING, *TORTS* 232 (1957). Illustrating this proposition are the decisions in *Severson v. Hauk*, 11 Wis.2d 192, 105 N.W.2d 369 (1960) (on a jury finding of assumption of risk and also charging the plaintiff's contributory negligence with 25% responsibility, the trial judge entered judgment for the defendant and the Supreme Court of Wisconsin affirms); *Seymour v. Maloney*, (1955) 1 D.L.R. 824 (Sup. Ct. of Nova Scotia), (held assumption of risk and complete defense, if contributory negligence; then apportionment on basis of 75% — 25% would have been proper). Cf. *Marasek v. Condie*, 12 D.L.R.2d 252 (Alberta Sup. Ct. 1958) (drinking party case handled on contributory negligence doctrine and passenger was 15% negligent in going on).

country on the subject of assumption of risk in automobile guest cases with plaintiffs often barred in the drinking party cases from any recovery.<sup>32</sup>

In those relatively rare cases of express assumption of risk it is proper and fair to state that no duty of care is owed to one who by contract has dispensed with that duty. But drinking party cases involving the assumption of risk doctrine do not involve express or contractual assumption of risk — far from it. In such a setting there is normally no explicit consideration given to the question whether the passenger will make a claim in the event of injury. If there were such a conversation and the question was put to the prospective rider in the context of the fact that the driver is insured, is it plausible at all that the parties would agree that no claim would be filed against the driver's insurer?

To intimate that there is an implicit understanding that no claim will be made in case of mishap in the drinking party situation is simply to manhandle or distort the facts. If the parties addressed themselves to the question, it is much more likely that the driver would encourage all to be of good cheer on the ground that he is insured. Similarly to charge the plaintiff with an agreement to accept a risky driver when the alternative was to abandon ship at some remote spot simply discounts the duress that situation and relationships can exert. When the courts deny plaintiffs any recourse to the courts in such cases, they are not enforcing any release agreement made by the parties. They are rather expressing the law's disapproval of the plaintiff's careless or foolhardy conduct. In short, on moralistic grounds they bar the plaintiff on the basis of his participation or involvement in the defendant's tortious conduct. To recite as do the cases that assumption of risk means that the defendant has violated no duty to the plaintiff, making the comparative negligence statutes inapplicable, is simply not persuasive. Whether the situation is one of "no-duty" or is one where the breach of duty is subject to a defense is wholly a matter of the internal construction of judicial opinions. In the face of a legislative prescription that contributorily negligent plaintiffs are to be permitted to recover, a withdrawal of the drinking party guest driver cases from the operation of the apportionment statute grounded on a distinction between contributory negligence and assumption of

---

32. Another unscientific leap to a conclusion. Both the CCH automobile cases and the Note, 15 A.L.R.2d 1165 provide supporting data.

risk is to draw a distinction too sharp, too attenuated, in these cases to serve the cause of justice. The mind of a judge ought not to rest easy with a broad axe dismissal of the drinking party case while a guest who carelessly diverts his driver's attention may be permitted to recover.

It may be, as some have argued, that the phrase "assumption of risk" covers some cases that are often not properly described as contributory negligence cases.<sup>33</sup> Assumption of risk connotes a state or condition of danger whereas negligence or contributory negligence bespeaks of specific risk creating acts or omissions. But in the context of the drinking party it is surely the height of unwisdom to debate whether the plaintiff's decision to remain with the party was contributory negligence or the assumption of risk. The basic consideration is that the plaintiff has failed adequately to heed the instinct for self preservation. If the legislature has prescribed that fault or contributory negligence on the part of the plaintiff is merely to reduce damages, then old learning to the effect that no duty of care is owed in the assumption of risk cases ought to be abandoned as having no relevance to the administration of comparative negligence statutes.

A distinction between assumption of risk and contributory negligence that made no practical difference before the days of comparative negligence statutes ought not to become the basis of a serious practical difference today. On this point the analysis offered by the older cases is simply not adequate.

It is not without interest in this context that jury verdicts reported in appellate cases indicate that juries would be inclined

---

33. The distinction between the assumption of risk and the contributory negligence defenses is the subject of an elaborate and extended analysis in Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 323, 334-350 (1943). Most emphatic was the statement of the Court of Appeals for the Third Circuit in *Potter v. Brittan*, 286 F.2d 521 (3d Cir. 1961) to the effect that scholarly opinion is quite unanimous to the effect that the two doctrines are quite distinct and never to be confused! But more considered judgments see the two as overlapping to a considerable extent. PROSSER, TORTS 304 (2d ed. 1955); RESTATEMENT, TORTS § 466 (1934). See HARPER AND JAMES, TORTS 1191 (1956).

If the argument of Professor Glanville Williams (which finds considerable support in the English cases, to the effect that assumption of risk or the *volenti* defense should be limited to those cases in which it is possible to say that the plaintiff expressly waived his right of legal action, WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE ch. 12 (1951)) should be accepted, then the area of overlap would be substantially reduced. HARPER AND JAMES, TORTS 1191 (1956) arrive at a similar conclusion to the effect that the assumption of risk defense should be limited to the situation of the express assumption.

to take a more lenient view of the non-driver in the drinking party case, reducing his recoverable damages but not barring his action. Indeed, some of these cases report jury findings both that the plaintiff assumed the risk of the driver's drunken driving and that the plaintiff's negligence was a 25% factor in the injuries sustained by the plaintiff!<sup>34</sup> The previous practice in Wisconsin and other jurisdictions in such cases has been simply to enter judgment for the defendant. It is that practice that is here deplored.

All the more reason then to cheer the 1961 decision of the Wisconsin Supreme Court in *Baird v. Cornelius*.<sup>35</sup> Impressed with a paper prepared for a meeting of the Board of Circuit Court Judges on the subject of "Contributory Negligence and Assumption of Risk" and perhaps by other writing on the subject,<sup>36</sup> five members of the court in concurring opinions indicated they thought the time has come to reconsider the relationship between the assumption of risk doctrine and contributory negligence in the context of the automobile guest case. Two members of the court in a forthright review of the authorities made clear their conviction that justice would best be served by assimilating the assumption of risk doctrine into contributory negligence defense, subject to their apportionment statute. As the concurring opinion put it: "A rule of law which makes complete denial of recovery dependent upon the vigor of a wife's protests to her husband, or her failure to leave the car many miles from home, or whether a fifteen year old girl sufficiently protests against the reckless driving of an intoxicated driver and asks to be let out of the car, is one which is open to question and ought to be re-examined."<sup>37</sup>

It is a heartening vindication of belief in the vitality of the common law to see a court announcing its determination to re-examine what has for too long passed without question. It is to be hoped that the Wisconsin court will shortly effect the assimilation of assumption of risk and contributory negligence in the automobile guest cases as urged in the concurring opinion in *Baird v. Cornelius* and further that other comparative negligence jurisdictions will follow suit.<sup>38</sup> This will not mean that the

34. See the cases cited in note 31 *supra*.

35. 12 Wis.2d 284, 107 N.W.2d 278 (1961), noted 1961 WIS. L. REV. 677.

36. 107 N.W.2d at 285 and see as well Comment, 1960 WIS. L. REV. 460.

37. *Id.* at 286.

38. Nebraska preceded Wisconsin in assimilating the contributory negligence defense into the contributory negligence defense subject to a comparative negligence statute. *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1942).

millennium will have arrived, for there are subsidiary problems to be dealt with — some of them sticky.<sup>39</sup> It will mean that there is a bit more of reason and consistency in the administration of justice in the automobile guest cases in states with comparative negligence statutes.

#### VOLENTI, THE DRINKING PARTY GUEST, AND PUBLIC POLICY

In those states which do not have apportionment statutes, and this group is by far the larger, it is not possible to resolve drinking party, guest-driver accident litigation by suggesting merely that the apportionment or comparative negligence statutes should be applied in such cases. Even in non-apportionment states it is nevertheless appropriate to inquire whether the ideal solution to the drinking party case is the dismissal of the guest's action against the driver on the ground of assumption of risk or contributory negligence. The matter may be considered first from the standpoint of policy.

It is difficult to relate to the public interest the going rule that bars the risk-taking guest from suit against the drinking driver. If it is thought that locking the courthouse door will teach the guest a lesson, the student must be recognized as a slow learner. As concerns the driver it is clear that application of the assumption of risk defense simply encourages him to gather up his friends for another unsteady journey. Nor is this prospect any cause for concern to the only coldly sober intelligence in the picture — that of his insurer. In short, recognition of the assumption of risk doctrine is not calculated to carry out any deterrent function for the law of torts in a setting where deterrence is singularly attractive.

By contrast, if guests suing drivers for traffic injuries from alcoholic parties were not barred by the assumption of risk de-

---

39. The commentary on the *Baird v. Cornelius* decision, Note, 1961 WIS. L. REV. 677, points out that there will be some vexing problems on the formulation of proper instructions for the jury on the assumption of risk-contributory negligence issue. The complications, most acute in the multiple party situation, can be traced in large part to the apparent necessity under the Wisconsin practice of basing the apportionment on a finding as to percentage of causation. The plaintiff's recovery is diminished on the basis of a determination of the extent to which the plaintiff's contributory negligence has operated as a cause of his injury. To think along these lines with respect to the risk-assuming passenger, who after all was only there, does create problems. It would be a happy thing if Wisconsin would abandon the percentage of cause approach in favor of the "imposition of fine" rationalization advocated in the text. Though a great amount of water is already over the dam it is not beyond the realm of possibility that the court might be willing to re-examine this troublesome matter of the criteria for effecting diminution in a negligent plaintiff's recovery.

fense, it is highly unlikely that this would encourage guests to ride with drinking drivers. Although the driver may be outside the arena of reasonable communication at the time of his intoxication, he is likely to be quite sober and reflective at the time he pays his liability insurance premium. The insurer's concern at the time the claim is generated and filed might very well be translated into a message the driver will understand in connection with his premium payment. Insurance companies have demonstrated in other settings an impressive potential for accident prevention,<sup>40</sup> and recognition of the assumption of risk defense in guest driver litigation simply reduces the pressure on the insurer to undertake a function of accident deterrence related to drivers who drink. Some companies presently provide a reduced premium rate for abstemious drivers. Perhaps rates should be generally a bit higher for those drivers who admit to occasional libations. Honesty in response on policy applications could be encouraged by a provision subjecting the insured in case of dishonest response to a heavy penalty, perhaps even an obligation to indemnify the insurer for any liability causally connected with the misrepresentation.<sup>41</sup>

Apart from the matter of possible deterrence the guest driver drinking party case in a sense crystallizes the question of whether the law of torts should limit itself to loss shifting in the pretense that massive systems of loss distribution are not in operation or whether the law of torts ought to see itself as an adjunct of the insurance mechanism with tort rules to be modified where possible to enlarge on the operation of the insurance — loss distribution principle. If the guest is barred from court on the assumption of risk defense, it is probably fair to say that despite Blue Cross, wage continuation plans and accident insurance a substantial part of the guest's damage will fall on the individual.<sup>42</sup> If the loss is shifted to the driver via court imposed liabil-

---

40. See James, *Accident Liability Reconsidered, The Impact of Liability Insurance*, 57 YALE L.J. 549, 559-563; Lemmon, *What the Independent Insurance Companies are Contributing to Traffic Safety and Why*, 1956 INS. L.J. 418 (a short and self-serving statement).

41. It is of some interest to note that in the State of Western Australia in the case of injury to a third party by a drinking driver the injured party has recourse against the insurance fund but the fund in turn has recourse against the driver who was driving while intoxicated. See Parsons, *Death and Injury on the Roads*, 3 ANN. L. REV. OF W. AUSTRALIA 201, 222, 291 (1954).

42. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTO ACCIDENTS ch. IV (The Columbia Study, 1932); James and Law, *Compensation for Auto Accident Victims*, 26 CONN. B.J. 70, 77-78 (1952). The Columbia study largely indicated that those losses not compensated for by liability insurance remained with the individual. There has been some increase in self insurance through Blue

ity, however, it will then be distributed through his liability insurance over drivers generally, perhaps with differential premiums for all drivers who do not class themselves as teetotalers. Though loss distribution does seem an inordinately expensive process, with insurance company costs of selling and administration using upwards of half of each premium dollar,<sup>43</sup> distribution of the loss sustained will appeal to many as compared with the alternative of visiting all or a substantial part of the loss on the individual guest.

Surely on any moral basis the drinking or acquiescent passenger is not to be tarred with a stickier brush than the drinking driver. From the moral viewpoint all in the party ought to share the burdens that result from their common course of conduct. If anything, there is something to be said for the view that the driver is in a special position. It is his conduct that creates the risk for himself, for his passengers, and for the traveling public. Any rule that relieves from responsibility for damage inflicted as a result of his irresponsible driving should be suspect.

Legislatures have quite generally recognized that the driver is to be regarded separately from his passengers. It is not an offense generally to ride as a passenger while in an intoxicated condition. It is universally an offense against the criminal law to drive while intoxicated.<sup>44</sup> One may well question whether the civil side of the court is adequately supporting the legislative policy in relieving from civil liability a drunken driver on the ground simply that his passengers assumed the risk. It would seem more in keeping with the legislation on the subject to deny the availability of the defense of assumption of risk in the face of a flat legislative command that no one is to drive while under the influence and that none can license such conduct.<sup>45</sup>

---

Cross, wage continuation plans, and accident insurance; but it is believed that much of the economic loss from automobile accidents estimated at \$6,500,000,000 in 1960 (NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 5 (1961)) still falls on individuals. Current studies updating the Columbia Report will supply further information on this point.

43. See NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 5 (1961), reporting overhead cost of automobile insurance as \$2,500,000,000 as against personal injury losses from auto accidents of \$4,300,000,000. The Statistical Abstract of the United States, 1961, at p. 560 reports that the losses paid in relation to premiums paid has varied over the past few years as follows:

1955 — 45.7

1956 — 52

1957 — 53.9

1958 — 52.7

1959 — 56.8

44. 5A AM. JUR., *Auto Highway Traffic* §§ 1156, 1158.

45. It is elementary that the assumption of risk defense is not available when



Finally, in states with "guest statutes" perhaps the statutory requirement that the guest establish "wilful or wanton misconduct" or "gross negligence" or even "wilful negligence" is as much by way of obstacle as the legislature wishes to place in the path of the litigating guest. Is it fitting to recognize as a separate defense the assumption of risk doctrine when the driver has so far departed from the standard of care in his deportment at the wheel? This approach is in harmony with the view expressed by many courts denying the availability of ordinary contributory negligence as a defense in such cases.<sup>46</sup>

If a court is willing to re-examine the question of whether the assumption of risk defense in the context of the drinking party guest driver lawsuit serves the public interest in our time, taking into account the existence of liability insurance, the threat posed by the drinking driver and legislation reflecting concern about that threat, it should be possible to work out a system that would deal with the problem more satisfactorily than the present all or nothing use of the assumption of risk doctrine. If in drinking party, guest-driver accident litigation the assumption of risk defense were to be wholly assimilated into the contributory negligence defense, this would mean that in all save extreme cases the defense will simply go to the jury for final resolution by it. Under such a contributory negligence approach even in guest statute states gross contributory negligence should be a defense to gross negligence. Possibly the jury could be relied upon to temper the plaintiff's recovery in recognition of the plaintiff's own culpability. Comparative negligence can operate outside as well as inside the law.

Perhaps it would be better, however, to recognize openly in drinking party cases that imposition of some sort of penalty on the risk-taking plaintiff would be socially desirable. Absent a

---

its use would frustrate the operation of protective legislation. Those intended by the legislature to be protected against their own weakness are not to be denied the legislative protection by the assumption of risk defense. RESTATEMENT, TORTS § 483: "Statutes designed to protect plaintiff against Inability to Protect Himself." If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such statute. PROSSER, TORTS 313 (2d ed.); HARPER AND JAMES, TORTS 1187 (1956). *Of. Martin v. Greyhound Corp.*, 227 F.2d 501 (6th Cir. 1955) (employee and wife supplied with passes that expressly waived claims against carrier—common carrier can't secure binding waiver of claims from paying passengers and public policy will not permit waiver of claim for wilful or wanton negligence even on the part of a gratuitous passenger).

46. See the cases cited in note 9 *supra*.

statutory comparative negligence mechanism, one approach, albeit a bold one, would be for the courts to continue to recognize the assumption of risk defense but limit its function in light of the operation of the liability insurance system to that of imposing a penalty or fine on the plaintiff. After all, the assumption of risk doctrine is only a complete defense because the courts have made it so. As reason dictates different results in the face of changed conditions so also can the operation of the assumption of risk doctrine be revised — by the courts. The assumption of risk by automobile guests provides a small area in which the courts could adopt by their own decision a kind of comparative negligence doctrine attuned to the fact of liability insurance. Because of the limited nature of the cases — the drinking party guest driver lawsuit, adoption of this suggestion would not seem as shocking as a wholesale adoption of the principle of comparative negligence by judicial fiat. Though it is probably not beyond the realm of possibility that a court might be disposed on common sense grounds to follow the suggested course, none will be surprised if this avenue to wider loss distribution remains vacant.

If one hazards a guess about the probable future development of the law in this area over the course of the next decade or so the forecast will run more in terms of probable increase in submission of the assumption of risk defense to the jury and its amelioration in that way rather than by renunciation of the doctrine in whole or in part. In harmony with this course of development restriction of the defense to litigation between the guest and his driver will continue. In the guest's suits against a third party it does not seem proper to charge the guest with assuming the risk of the negligence of some third party and by and large the present case-law recognizes the impropriety of the use of the assumption of risk defense in such cases. The defense of contributory negligence can, of course, be invoked in such cases.<sup>47</sup>

---

47. The cases are collected in a series of Notes, 18 A.L.R. 309, 22 A.L.R. 1294, 41 A.L.R. 767, 47 A.L.R. 293, 63 A.L.R. 1432. Representative modern decisions denying the availability of the assumption of risk defense when the guest sues the other driver are *Seal v. Lemmel*, 140 Colo. 387, 334 P.2d 694 (1959); *Berkstresser v. Voight*, 63 N.M. 470, 321 P.2d 1115 (1958). Of interest in this connection is the recent English decision in *Dawrant v. Nutt*, (1960) 3 A.E.R. 681, where *Stable, J.*, held that the plaintiff was in breach of duty in riding as a passenger on an unlighted motorcycle so as to diminish her recovery 25% under the comparative negligence act. As between the plaintiff's deceased husband and the other driver, however, the blame was assessed 50-50.

The comparative negligence statutes permits of a more satisfactory handling of this type of problem. Though the defense of assumption of risk is generally not available to third party defendants, its cousins, contributory negligence and im-

Though the undercurrent moving in the direction of wider loss distribution may be expected to have its effect on the actual use of the assumption of risk defense in guest driver accident litigation, it must be recognized that there are some countervailing currents at work. It is surely significant that the one state in this country yielding by far the greater number of assumption of risk guest-driver cases has been Wisconsin. Wisconsin has a comparative negligence statute, allows a direct action against the insurer, permits suits between family members; the state has no guest statute and the special verdict practice is customary. In this setting the courts' previous enthusiasm for the assumption of risk defense perhaps reflected a judicial concern that the scales have tipped too far in favor of the plaintiff. In some states the assumption of risk defense may well continue in vogue until such time as the legislature sees fit to deal drastically with the problem.

---

puted negligence through joint enterprise or common control, are available and on occasion provide a complete defense to the third party.